In the District Court of the United States for the Eastern District of Michigan, Southern Division

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Civil Action No. 6295

GREAT LAKES STEEL CORPORATION, A DELAWARE CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

and

INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENING DEFENDANTS-APPELLEES

MOTION OF INTERSTATE COMMERCE COMMISSION TO AFFIRM

Intervening appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the decree of the District Court be affirmed upon the ground that this appeal presents no substantial question.

This is a direct appeal from the final judgment, dated December 22, 1948, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of

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October 22, 1913, dismissing plaintiff's complaint to set aside an order of the Interstate Commerce Commission.

The suit was brought by Great Lakes Steel Corporation to set aside a report (264 I. C. C. 779) and order of the Commission entered May 28, 1946, wherein the Commission denied Appellant's claim against the Baltimore and Ohio Railroad Company, the Erie Railroad Company, and the Pennsylvania Railroad Company, for reparation with respect to certain shipments of iron and steel from various producing plants to Mansfield, Ohio, at which point it was fabricated and sold to the United States Government, which in turn shipped the manufactured articles to various naval bases. Appellant contended that the movements to and from Mansfield should be treated as a single through shipment for which the carriers, under their transit tariffs, should have collected only the through rate instead of having collected the separate rates applicable to the movements to and from Mansfield.

In denying Appellant's claim for reparation, the Commission said that the question presented was: Whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous movement under the provisions of the applicable tariffs? It found (264 I. C. C. 781) that "The contents of the

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shipments from Mansfield were the property of the Government as soon as they were loaded on the cars at that point, and the Government was interested only in the transportation service from Mansfield": further, that "It was the purpose of the Navy Department to make new shipments from Mansfield, independent of in-bound movements." (264 I. C. C. 781). After stating that the theory of transit "is that there is a continuous movement from point of origin to ultimate destination" the Commission concluded (264 I. C. C. 781):

> The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on the cars at Mansfield, elected to ship them from that point as separate and independent shipments. Control of the shipments from the transit point passed from complainant to the new owner (the Navy Department), who paid, or will pay, freight charges on the basis of the rates, as modified by Section 22 quotations or subject to land-grant deductions, from transit point to final destinations. Complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from points of origin to the final destinations.

Appellant's petition for reconsideration was denied by the Commission, November 4, 1946, and thereafter appellant filed this suit.

The Interstate Commerce Commission and intervening railroad defendants, in addition to answering on the merits, challenged the jurisdiction of the lower court to entertain the action. The matter was heard both upon the jurisdictional issue and on the merits. By opinion filed December 22, 1948, the district court sustained the pleas to the jurisdiction and entered judgment accordingly. This appeal followed.

I. Jurisdiction

Appellant filed its complaint with the Commission under the authority of Section 9 of the Interstate Commerce Act for the recovery of damages. This section provides that such proceeding may be instituted by complaint to the Commission or by suit in any district court of competent jurisdiction but, in terms, also provides that a party availing himself of this remedy "shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided he or they will adopt."

This Court has consistently held that there is no review under the Urgent Deficiencies Act of an order of the Commission denying repara-

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tion. In *Standard Oil Co.* v. *United States,* 283 U. S. 235, the suit was brought under the Urgent Deficiencies Act to annul an order of the Commission dismissing two complaints to recover damages on the ground (as in this case) that the legally applicable rates had not been applied to the transportation in question. This Court held that the provisions of Section 9 of the Act, requiring election of remedies, barred assumption of jurisdiction. This case was followed by *Allison & Co.* v. *United States,* 12 F. Supp. 862, 863–4 (S. D. N. Y.), affirmed *per curiam,* 296 U. S. 546. While *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, overruled to a great degree the old "negative order" doctrine, it specifically showed that the main basis for the decision in the Standard Oil Case was the statutory scheme dealing with reparations and not the "negative order" doctrine. Subsequent cases have clearly shown that the district court lacks jurisdiction to deal with this type of case. *Atlantic Lumber Corp.* v. *Southern Pacific Co.,* 47 F. Supp. 511, 514 (D. C., Oregon); *Ashland Coal & Ice, Inc.* v. *United States,* 61 F. Supp. 708 (E. D., Va.) affirmed *per curiam,* 325 U. S. 840. In this Court's affirmance of the *Ashland Case,* the *Standard Oil Case* and the *Allison Case* were cited as authorities.

El Dorado Oil Works v. *United States,* 328 U. S. 12, has not upset the authority of these

cases since there was no question involved in that case of the statutory scheme of reparation procedure: this Court was dealing merely with administrative action by the Commission in aid of an action in assumpsit for breach of contract brought by a shipper against a private car corporation.

Appellant contended before the lower court that the Administrative Procedure Act has made reparation orders subject to review independently of the Urgent Deficiencies Act. But it is clear both from its text and its legislative history that that Act was not designed to provide judicial review of administrative action where such review had theretofore been precluded. *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. Supp. 529 (C. A., D. C.).

The opinion of the District Court deals with these jurisdiction contentions. Its conclusions are sound and no substantial questions arise to invoke this Court's consideration of the appeal.

II. The Merits

Appellant's contentions that the Commission's report and order is without support of substantial evidence must be rejected. The question of the applicability of a rate under a transit tariff is an ultimate question of fact, entrusted, like many other questions, to the expert judgment of the Commission, *Cincinnati, New Orleans & Texas*

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Pac. Ry. v. *Interstate Commerce Commission,* 162 U. S. 184, 194, 196; *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 455, 456. The Commission held that the transit tariffs did not apply to the shipments in question. They were separate and independent shipments by reason of the transfer of title at the transit point and the control exercised by the Government over the outbound movement. These findings afford a rational basis for the conclusion that the transit tariffs were not applicable. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286, 287; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145, 146; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6, 7.

The factual findings which form the basis for the administrative judgment are unassailable if they have substantial support in the evidence. The weight of the evidence is for the Commission. *Mississippi Valley Barge Line* v. *United States, supra; Medo Corp.* v. *Labor Board,* 321 U. S. 678, 681, fn. 1. The Commission's findings that title passed to the Government and that it had complete control of the out-bound shipments is amply supported by the evidence. There is need but to point out the deposition of Lieut. Dippold to support these findings.

It is submitted that this appeal presents no substantial grounds for this Court's consideration and the judgment of the District Court should be affirmed.

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